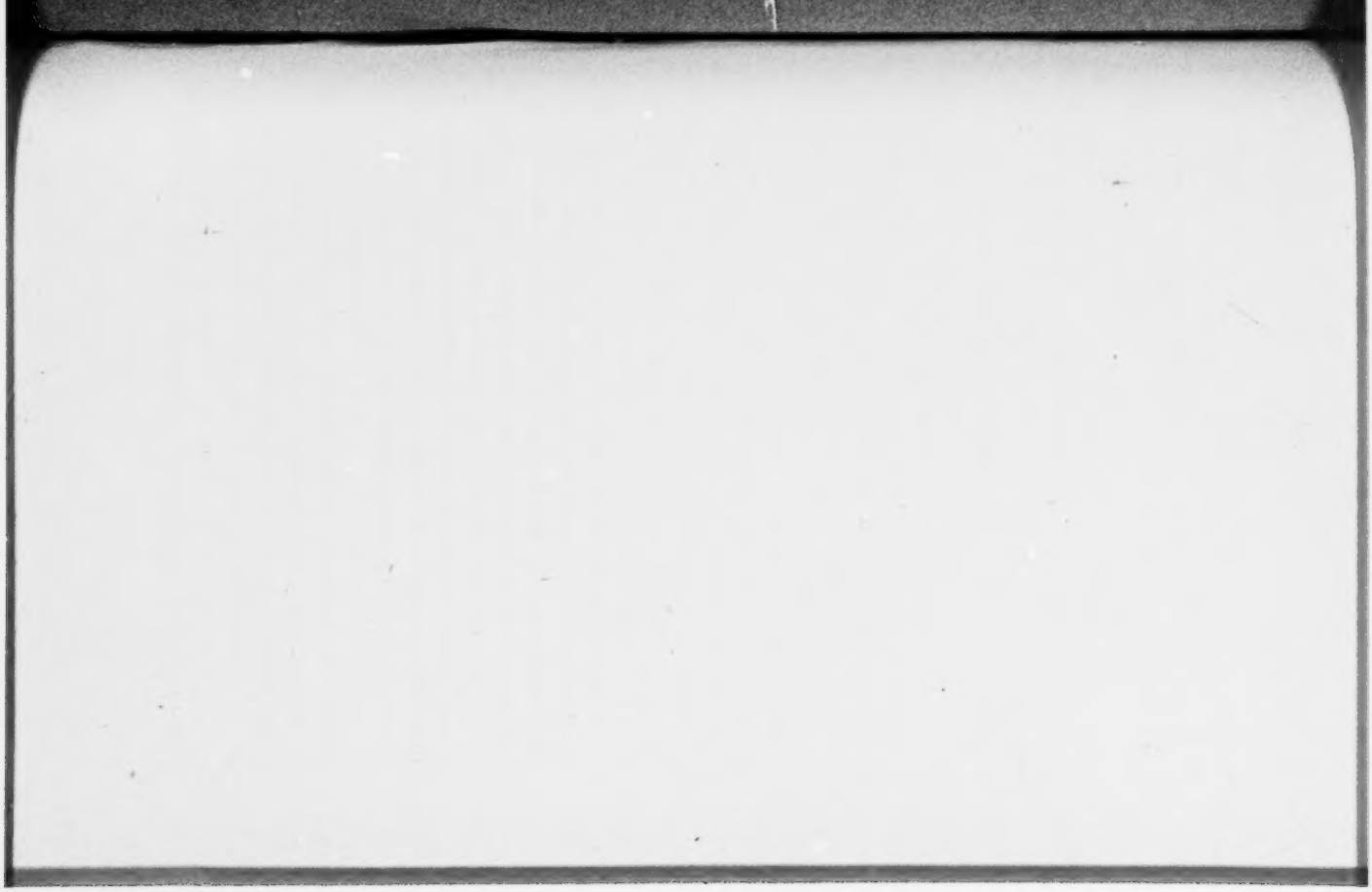

FILE COPY.

OFFICE OF THE CLERK
RECEIVED
MAY 4 1905
SUPREME COURT U. S.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES and the KIOWA INDIANS, Appellants,

vs.

JUAN B. MARTINEZ, Administrator of the Estate of JULIO MARTINEZ, Deceased, Appellee.

No. 15.

Petition For Appellee For Rehearing.

WILLIAM H. ROBESON,
Attorney for Appellee.

IN THE

Supreme Court of the United States.

October Term, 1904.

THE UNITED STATES and the KIOWA INDIANS, Appellants,

vs.

JUAN B. MARTINEZ, Admr. of the Estate of Julio Martinez, deceased, Appellee.

No. 15.

PETITION OF APPELLEE FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Juan B. Martinez, appellee in this cause, feeling aggrieved by the decision of this Honorable Court reversing the judgment of the Court of Claims, and believing, from a careful consideration of the opinion of this Court, delivered herein, that substantial questions were overlooked by the Court or were not considered by it, most respectfully petitions for a rehearing of this cause, and shows unto the Court as follows:

The decision of this Court was that after the expiration of the three years in which, by the Act of March 3, 1891, known as the Indian Depredations Act, it was pro-

vided that claims on account of Indian depredations might be filed against the United States and the Indians, no amendment substituting other tribes of Indians than those named prior to March 3, 1894, should be permitted.

In the opinion of the majority it is said—

> "Whichever form the action takes, it must be brought within three years after the passage of the act, as provided by the first section. In requiring the band or tribe of Indians to be described, as near as may be, it is the purpose of the act to require such tribe primarily liable for the injury to be brought before the Court, when they can be identified for the purpose of the judgment authorized in the fifth section. All the sections are to be read together to effectuate the purpose of the law, and when the tribe 'can be identified' it must be described as near as may be, that is, with reasonable accuracy, sufficiently identifying the party for the purposes of the action and judgment, resorting to the liability of the United States alone only in cases where the offending parties cannot be identified." 195 U. S., 469–474.

It is very respectfully but very earnestly submitted to the Court that there are two instances of error in this very material statement. The first of these is the declaration of the opinion that "when the tribe can be identified, it must be described as near as may be." This declaration seems to disregard the fact that identification is the duty of the Court, and inasmuch as the identification is to be made by the Court in its judgment, therefore, identification by the Court must, of course, be subsequent to the description of the Indians "as near as may be" by the claimant.

The petitioner in one of these cases was not to "identify," but to "set forth" the Indians "as near as may be." Proof is then to be taken, not merely on the subject of the depredation, but also on the subject of the identity of the Indians; for a finding by the Court on each subject is imperative, and when such proof is taken, then it is the duty of the Court to determine whether the depredation has been committed, and if so, by what Indians. In this connection, but in another part of the opinion (*Ibid.*, p. 475), it is stated that the claimant, under the Act of March 3, 1891, had three years in which to determine the identity of the Indians. That seems to disregard the evident fact—evident from conditions affecting the Indians and their relations with citizens of the United States, of which the Court must know—that if the claimant had been given ten years or thirty years for that purpose, he might still have been unable to identify them. Such was the condition in the case of Joshua Gorham. (165 U. S., 316.) A claimant was not required, I respectfully submit, to identify the Indians, but only to set them forth as nearly as he could.

And herein lies what seems to counsel to be the second error in the paragraph quoted, these being the words:

> It must be described as near as may be, that is with reasonable accuracy, sufficiently identifying the party for the purposes of the action and judgment. *Ibid.*, p. 475.

I submit that the Court has given in this statement an incorrect definition and application to the words "as near as may be." In the light in which counsel reads

those words, the interpretation given by the Court to them would seem to be as if the *tribe* was to be described "as near as may be." There can be no approximation to the description of a tribe. There is but one way to identify it. An Indian tribe is described, and described accurately, by the designation "Sioux," or "Cheyenne," or "Comanche," or "Apache," and it can not be described in any other way. The act says:

> Section 3. That all claims shall be presented to the court, setting forth in ordinary and concise language, without unnecessary repetition, the persons, classes of persons, tribe or tribes, or band of Indians, by whom the alleged illegal acts were committed, as near as may be.

The tribe is not to be *identified*, nor to be described "as near as may be," but to be named, "to be set forth" "as near as may be." Now it is respectfully submitted that those words "as near as may be" are not to be interpreted otherwise than that if the petition name to the best of petitioner's ability the Indians, if he do his best to set them forth, he has complied with the provisions of the act. And if, by reason of the innumerable, and at times insuperable difficulties in the way of identifying the Indians, he fail in his effort to designate the tribe to which the guilty parties belonged, nevertheless he has complied with the requirement of the law. Counsel's position as to this can be thus illustraied:

On one reservation have been maintained for many years the Kiowas, Comanches, and a certain band of Apache Indians. The reservation was known to the authorities of the Government as the Kiowa, Comanche,

and Apache Reservation, but all the Indians on that reservation were generally known as Comanches, by reason of the fact that the Comanche tribe was superior to either or both of the others in numbers. Now, suppose a depredation had been committed within a few miles of their reservation and in a section where certainly no other Indians were given to the commission of depredations. A claimant loses a band of horses. He traces these horses by their trail into the borders of the reservation. Under the law he could not cross those borders in pursuit of his property. He does not see the Indians commit the depredation; it perhaps occurred at night, and he is able to impute the depredation to them only from the circumstances or locality and from the direction and termination of the trail. Naturally he would charge this depredation to the Kiowa, Comanche, and Apache Indians. If, naturally, he would have done this, has he not set forth "as near as may be" the Indians who committed the depredation? It may have been, however, that a party of Wichitas or Caddoes, who then lived adjacent to the Kiowa, Comanche, and Apache reservation, had taken those horses and driven them back to their own home through the reservation of the Kiowas, Comanches, and Apaches. That fact is one which might not be discovered for twenty years; it might never be discovered. Now, under this opinion of the court, the claimant having done all that a reasonable, intelligent man could do in attempting to set forth the Indians, will, nevertheless, be denied judgment, if by some unlucky mishap he should subsequently learn,

and be honest enough to prove, that the Indians were Wichitaws or Caddoes—other Indians than those who he believed and who he had the right to believe, from the circumstances, committed his depredation. Yet, I submit to the court, he set forth the depredators as near as possible; but under the decision of this court, he is required to be absolutely accurate in his identification of the Indians; his judgment, in order to entitle him to recover, must, upon that point, be infallible; it must be only the foreshadowing of the judgment of the Court of Claims, which reaches its judgment only after all sources of proof have been exhausted, all possible lights shed upon the identity of the Indians. Is it to be supposed that Congress ever intended that such results should be accomplished?

The Court in its opinion says (and we make no complaint of that), that all the sections of the act are to be read together to effectuate the purposes of the law. Now it is submitted the words "as near as may be," "if possible," and "when such can be identified," all bear upon exactly the same proposition, namely, the identification of the Indians to the end that in such judgments as the Court might award, the Indians were to be named as defendants. Therefore, these terms of expression, all bearing upon the same proposition, should each receive the same construction. Now the Court has decided in the Gorham case (165 U. S., 316), that the words "when such can be identified," applied to the judgment of the Court as a direction to the Court in the award of judgment, mean that when the Indians cannot be identified,

the Court is not to attempt it, but is to render its judgment against the United States alone. Similarly, it was declared, in the same case, with reference to the direction to the Court to determine "if possible" the tribe of Indians, that if it is not possible, then the Court of Claims is not to attempt it, but to proceed to render its judgment against the United States alone. In other words, it is clear that the Court has given a meaning to these last instructions which, in this opinion, it refuses to give to the instruction directed to the claimant; that is to say, it has adjudicated that if it is not possible to determine the tribe, the Court is not to attempt it, and if the Indians cannot be identified, then judgment is to be awarded against the United States alone; but as to the claimant in nine cases out of ten, or perhaps in greater proportion, utterly unable to identify the thieves who stole his horses in the night, he is, nevertheless, to be held to forfeit his claim because he had not set forth accurately the Indians which the Court itself might possibly, after reading volumes of proof, be unable to determine. Why shall we not say, in view of these things, that if the petitioner has set forth the Indians "as near as may be" he shall, even if he failed in positive and accurate identification, yet be entitled to the judgment which the Court has the privilege of awarding and is directed to award in cases where it is not possible to determine accurately the identity of the depredating Indians.

Some suggestions are made in the brief filed on the original hearing of this cause, which it seems to me have

not received sufficient consideration by this Honorable Court, and one of these in particular seems from this opinion to have been directed to the very question which may be assumed to have been the chief inducement to this judgment. That inducement is that, after the expiration of the time in which new suits were allowed to be brought, a new party, under the prevailing practice in the Court of Claims, could be brought in. A perfect answer to that objection is that the Indians are not necessary parties to the suit. Is there, in any other litigation, a right to a judgment against any defendant, when either by personal service or by publication or by service upon a guardian, trustee or committee, notice of the institution of the suit has not been brought home to the defendant? We have here an act which provides that notice shall not be necessary to be given to the Indians, but that service upon the Attorney-General is notice to all the Indian tribes, nations or bands within the United States. When the Court decided the Gorham case (*supra*), authorizing an award of judgment against the United States alone, it then and there necessarily decided *that the Indians were not necessary parties;* for, if they had been necessary parties, the Court could not have rendered that judgment against the United States alone. Now is there reason for a holding that in one of these eleven thousand cases the Indians may not be necessary parties, and yet that in all the other ten thousand, nine hundred ninety-nine they are? Is there not reason and strong reason for the proposition that if the Court, in one of the cases, holds Indians not to be necessary

parties, it cannot in any case hold them to be necessary parties? The action in the Gorham case and this action case were based upon acts of Indians of exactly the same kind, and the right to recover for losses following those acts depends exactly upon the same law. If, therefore, Indians are not necessary parties in this case, then can it possibly make any difference that, under the direction of the act and in good faith to aid the Government in charging up the judgments to the guilty parties, the claimant failed to ascertain, before bringing his suit, the indentity of the Indians?

Another suggestion was made by counsel in argument which it seems to him should have received the consideration of the Court. He was, perhaps, unhappy in his statement of it. An incident was supposed in which the claimant had averred in his petition that the depredators were unknown Indians. In that petition the petitioner did not comply with the direction of the law to name the Indians as near as may be. In the progress of the cause the identity of the Indians is developed, but the evidence disclosing the identity is not taken until after the expiration of the period in which claims of this character might be filed in the Court of Claims. When that case came on to be heard by the Court of Claims, was it the duty of the Court to determine and to ascertain that tribe shown by the proof to have been guilty of the depredation, or was the Court, because the claimant had previously announced his inability to identify the Indians, to make a finding against the United States alone, in the face of the evidence in the record

showing the identity of the Indians? Should the Court dismiss a suit because the claimant, alleging that the Indians were unknown nevertheless established their identity? Or should it have regard to the evidence on identity, and to the peremptory direction of the act, and advise Congress by its judgment who the guilty parties were? It is the logical result of the decision in this case that, in such a case as just instanced, the Court should disregard the requirement made by Congress to identify the Indians, when it could do so, merely because the claimant, when he brought his action, was unable to identify them, and because the identity was established after the expiration of the three years in which suit might be brought. Any other decision would negative also the decision in the Gorham case.

The Indian Depredations Act is unlike any other act by which the United States has assumed liability. In the first place, it provides a gratuity, for while the promise had been made for more than a century, it was gratuitous at the outset. In the second place, it provides for the bringing of a suit and the award of judgment against defendants who were not to be given notice of the institution of the suit, and it contains other unusual provisions, among them those which arise and are being considered in this case. In view of the unusual character of the act, and the lack of precedents other than those which have been cited, it is permissible for counsel to give an actual instance of the great injustice which will result if the decree of the court in this case be sustained:

On the 7th day of August, 1866, a party of 300 Indians from the Kiowa, Comanche, and Apache Reservation, made a famous raid through the valley of the San Saba River in Texas. Since the original argument of this cause in this court, the evidence in the cases arising from losses suffered in that depredation has been concluded. It appears from that evidence that the Indians drove away some twenty or twenty-five thousand head of cattle belonging to fifty or sixty different owners. It seems that the Indians started in to make the drive of the cattle at a point some distance south from the head of the river, while others concealed themselves near the head of the river and joined in with the others as they came, driving the cattle they had gathered up the river. Those Indians came into contact with a small party of cattlemen on the head waters of the river. Every one of those cattlemen, believing the Indians to be the Apaches by their stature, declared in their petitions against the Apache Indians, and upon their advice, others not familiar with the dress and appearance of any Indians declared also against the Apaches.

But a considerable number of the claimants, who lived at those points on the river where the Comanche and Kiowas came in making their drive, and having knowledge of the dress and physical appearance of the Comanches and Kiowas, imputed the depredation to them. Now under the decision of the court in this case, it having now been determined that the Indians were Comanches, every claimant who imputed the depredation to the Apaches must lose his suit, while those fortu-

nate enough to accept advice that the Indians were Comanches and those who saw Comanche Indians and who, therefore, named the Comanches as the depredators, will recover a judgment. And yet, those persons living near the head of the river who believed they saw Apaches, with equally good reason named them as defendants. This furnishes the Court an illustration of a case wherein the claimant "as near as may be" identified the Indians who committed the depredation. How may it be justly said to comport with either the spirit or the letter of the Act of March 3, 1891, that claimants must not merely set forth the Indians "as near as may be," but must, with absolute exactness and with the utmost accuracy, describe the depredators.

It would be presumptuous in counsel to discuss the effect of the Gorham case, in view of the discussion of that case by Mr. Justice White and Mr. Justice McKenna in their dissenting opinion, but it is not indelicate to repeat one statement of that opinion with reference to the opinion of the majority, being in these words:

> "To adopt it without specifically overruling the Gorham case, it seems to me, is to declare on the one hand that it is not essential to prove the allegation that the wrong was committed by a particular tribe, and on the other hand to say that the allegations as to the tribe committing the wrong were essential to the cause of action. That is, to declare that a particular allegation is at the same time both essential and non-essential—essential to be alleged but not essential to be proved."

For all the reasons hereinbefore given, it is, therefore, respectfully prayed that this petitioner be granted a rehearing.

WILLIAM H. ROBESON,
Attorney for Petitioner and Appellee.

I, William H. Robeson, attorney for the appellee, who is also the petitioner, do hereby certify that the foregoing petition is in my opinion well founded in law, and that it is not interposed for delay.

WILLIAM H. ROBESON.